Appeal No. UKEATS/0036/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 21 January 2014

Before

THE HONOURABLE LADY STACEY

MISS S M WILSON CBE

MR M SMITH OBE

KIDRON HOUSE — APPELLANT

MISS ADELE CAMPBELL HOWIE — RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	MR K McGUIRE (Advocate) Instructed by: C Houston & Co Solicitors 24 Portland Road Kilmarnock Ayrshire KA1 2BS
For the Respondent	MR R HONEYMAN (Solicitor) The McKinstry Company Queen's Court House 39 Sandgate Ayr KA7 1BE

SUMMARY

UNFAIR DISMISSAL – Compensation

The Claimant was employed by the Respondent as a chambermaid at Kidron House Hotel, owned by the Respondent, between 1 June 2011 and 23 April 2012. She was dismissed and made a claim of unfair dismissal. The Employment Tribunal decided that she had been unfairly dismissed, by reason of being pregnant. An award was made in respect of a basic award and a compensatory award. The Respondent appealed alleging that the ET had erred in law by failing to make a **Polkey** deduction. **Held**: that the ET had not explained in its reasons that it had considered the chance of the Claimant being dismissed fairly during the period for which it had made an award. It had made an award for the whole period sought. The ET erred in law by failing to give their reasoning for the decision that there was no chance of the dismissal and therefore no deduction. The case is remitted to the same Tribunal in order that they consider, on the facts already found, the matter of compensation afresh.

THE HONOURABLE LADY STACEY

Background

1. This is an appeal in relation to the proper calculation of loss following an unfair dismissal. We shall refer to the parties as the Claimant and the Respondent as they were in the Tribunal below. In the Respondent's Notice of Appeal it is sought to argue that the Employment Tribunal had erred in making no finding of contributory conduct leading to dismissal under section 123(6) of **Employment Rights Act 1996**. That ground was not allowed at the stage of the sift. The grounds which were allowed relate to an argument that the ET erred in law in connection with the calculation of compensation under section 123(1) of the 1996 act.

2. The Claimant was employed by the Respondent as a chambermaid at Kidron House Hotel between 1 June 2011 and 23 April 2012. It is a small hotel, having 14 bedrooms. The Claimant worked part-time, approximately 16 hours per week. The owners of the Respondent business were Mr and Mrs MacInnes. They employed various members of staff, including a manager, Mr Thapa.

3. The case was heard over 5 days in December 2012, February 2013 and March 2013 by the Employment Tribunal, chaired by employment judge Gall. By a decision copied and sent to the parties on 25 March 2013, the ET gave the following unanimous decision: –

> **"(i) The dismissal of the Claimant by the Respondents was unfair in that the reason or principal reason for the dismissal related to the pregnancy of the Claimant. The reason or principal reason was connected to her pregnancy. The terms of section 99 of the Employment Rights Act 1996 ("ERA") and Regulation 20 (1) and (3) of the Maternity and Parental Leave Etc. Regulations 1999 were breached by the Respondents;**
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> **(ii) The Tribunal orders that the Respondents shall pay to the Claimant a monetary award, being constituted as detailed below of £7173.60. The prescribed element is £4697.60 and relates to the period from 23 April 2012 to 25 March 2013, date of judgment. The monetary award exceeds the prescribed element by £3697.60.** [We note that there appears to be a clerical error in the figures which will require to be corrected by review by the ET.]

(iii) The monetary award comprises a Compensatory Award in respect of the period from 23 April 2012, date of dismissal, to 3 December 2012 when the Claimant's maternity leave would have commenced. That is a period of 32 weeks. The weekly payment applicable is £97.28. The sum in this regard which is awarded is £3112.96. An award is also made in respect of loss of future earnings in the period from 3 December 2012 to 2 September 2013, a period of 39 weeks, at the rate of £99.04 per week. The sum awarded in this regard is £3862.56.

(iv) The Respondents failed to provide a statement of initial employment particulars to the Claimant in breach of Section 1 of the Employment Rights Act 1996. In terms of section 38 of the Employment Act 2002, an award is made by the Employment Tribunal of the minimum amount of 2 weeks' pay, that amounting to £198.08. This amount is included in the monetary award."

4. The ET found that the Claimant did not have a good attendance record. She would often phone in sick immediately prior to her shift commencing. On occasion either her mother or sister would telephone on her behalf. This caused concern to the Respondent both because it caused difficulty with staff cover in relation to the work to be done, and because they did not wish others to make phone calls on behalf of the Claimant. Two of the duty managers, Ms Cavin and Mr Thapa, spoke to the Claimant informally about these concerns, in November and December 2011. If the Claimant was not present at work through ill health she was not paid. Thus in the first part of the Claimant's time with the Respondents, that is between June and December 2011, while the Claimant was absent on various occasions, the Respondents limited any action taken by them to informal discussions. They paid her only for the hours that she did work.

5. In January 2012 the Claimant's father became aware of the Claimant having less money than he had thought she would have by way of wages. The Claimant did not tell her father that she had been absent. The Claimant's father phoned the Respondent on 13 January 2012 and spoke to Mr Thapa. He was angry about what he believed to be an underpayment to his daughter. Mr Thapa said that he would have to speak to the owner, Mr MacInnes. A meeting took place between the Claimant, her father, and Mr MacInnes on 13 January. The outcome of it was noted by Mr MacInnes as being that the Claimant accepted that she had been off and her father said that he would make sure that she attended work regularly. There was discussion

about a practice whereby the Respondents phoned the Claimant the night before she was due to work, and it was agreed that they would not do that and that she would attend work regularly. The ET found that it was agreed at the meeting that "the slate was wiped clean" and that there was to be "a brand-new start".

6. The ET found that the Claimant attended faithfully for a fortnight, and after that, absences recommenced. The Respondent went back to phoning her the night before work to check that she would be available for work, but there were still further absences. The Claimant was absent on 5 March, and her absence that day was intimated by her mother. The Respondent asked the Claimant to attend a meeting on 6 March at which Mr MacInnes told her that if she was to be off again he would not be able to keep her on in his employment. He said that absences were getting out of hand. He also reminded her that he should not be contacted by a third party in respect of an absence but that she should contact him herself. Mr MacInnes wrote out a note of the meeting and signed it himself and had Mr Thapa sign it. He did not however give a copy to the Claimant and she was not aware that it was being prepared. The note was in the following terms: –

> **"FINAL WARNING**
>
> **Adele Howie**
>
> **Tuesday 6 March 2012**
>
> **Adele, having been absent again and once again arranging to have us contacted by a third party, I have regrettably informed her that on the next occasion of absence she will be dismissed as this is her 27th absence in 5 months. Adele concurs that this is a fair decision and assures us that it will not happen again."**

7. The Claimant was absent again on 19 March 2012, through ill health. Nothing was said to her about this by the Respondent. Between 19 March and 21 April 2012 the Claimant was not absent from work.

8. On 19 April the Claimant found out that she was pregnant. She attended work on 20 April and told Mr Thapa that she was pregnant. He told Mr MacInnes. The Tribunal found, in paragraph 52, that Mr MacInnes thought that the Claimant's pregnancy might result in more absences, or give her a basis on which she might say that she was absent. He thought that pregnancy might, in the Claimant's mind, give her more time in the sense that she had been told she would be dismissed if she was off again, but he thought that she might think that would not apply strictly as she was pregnant.

9. In the evening of 20 April the Claimant became unwell. She was affected by sickness and diarrhoea. Her mother phoned the Respondent to inform them that the Claimant would not be well enough to attend the next day, explaining that she was ill with "a bug". This illness was not related to pregnancy.

10. On 21 April Mr MacInnes decided that he wanted to arrange a meeting with the Claimant for 23 April. On the evening of the 21 April the Claimant spoke to Mr Thapa and said she would be able to work the next day. Mr Thapa told her that that would not be possible and that Mr MacInnes wanted to speak to her on 23 April. That meeting was then postponed and took place on 24 April.

11. The ET found that Mr MacInnes decided on 21 April to dismiss the Claimant because he was concerned about future absences, having regard to her record of absence. The Tribunal found that while the decision was not based solely on the fact that the Claimant was pregnant, her pregnancy was the real and effective of cause of the decision to dismiss.

12. A meeting took place on 24 April at which Mr MacInnes and Mr Thapa attended along with the Claimant and her sister. Mr MacInnes had already prepared a letter telling the

Claimant that she was dismissed, in which he said that the dismissal was due to "continual individual absences and your refusal to contact us directly, as agreed." He stated that on 5 March, after another absence, he personally gave her a final notice letting her know that the next time she was off she would be dismissed. The Claimant's sister disputed that there had been absences on the Claimant's part. She was shown timesheets. She then asked Mr MacInnes whether the dismissal was due to the Claimant's pregnancy and he denied it. The Claimant was upset and after leaving the meeting on 24 April 2012 did not return to work with the Respondents.

The issues before the ET

13. The ET set out the issues at paragraph 78 as follows: –

> **"(a) Was the reason or principal reason for dismissal of the Claimant by the Respondents one connected with the pregnancy of the Claimant?**
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> **(b) If so, what compensation was to be awarded to the Claimant on the basis that in that circumstance the dismissal would be unfair?**
>
> **(c) Had the Respondents failed to comply with the obligations to provide an initial statement of employment particulars to the Claimant?**
>
> **(d) If so what financial award was to be made by the Tribunal in respect of that failure?"**

14. The ET decided that pregnancy was the principal reason for the dismissal, and that it was an unfair dismissal for that reason. It decided that an initial statement of employment particulars had not been provided to the Claimant. No issue is taken with the Tribunal's decisions on these matters. There is however an issue about compensation and as the argument before us was developed it was necessary to consider the findings which had been made about the dismissal in order to decide whether there had been any error of law by the Tribunal in the way in which it calculated compensation.

15. The Tribunal correctly directed itself on the applicable law for unfair dismissal related to pregnancy. The submissions for the Claimant and the submissions for the Respondent are narrated by the Tribunal and in the section of the reasons headed "Discussion & Decision" the Tribunal sets out careful reasons for its decision that the dismissal was in relation to pregnancy. In particular, the ET noted at paragraph 171 that it was clear that the Respondents had not simply said in isolation that as the Claimant was pregnant her employment would require to come to an end. The ET noted that the Respondents led evidence, without contradiction, that other employees had been pregnant and that there had been no issue with maternity leave and the return to work after pregnancy. In paragraphs 173 to paragraph 186 they gave their reasoning for deciding that pregnancy was "an effective cause". We refer to submissions made about these findings below.

16. Under the heading "Compensation" the ET made findings in paragraph 187 to 196. At paragraph 192 the ET stated that they gave consideration to what might have happened had the Claimant remained in employment with the Respondents. The reasons state:

> **"This is relevant as it may be that the Tribunal had evidence before it that the employment of the Claimant would in any event have come to an end at any particular stage. That might result in compensation, although sought for a longer period, being limited. One obvious example would be if the Respondent in a case has ceased trading shortly after dismissal. That would lead the Tribunal in that type of case to conclude that the employee would have seen his or her employment end in any event at the time when the Respondents ceased trading."**

17. Having directed themselves as to the relevance of the possibility of the Claimant being dismissed fairly, the ET found in paragraphs 193, 194 and 195 as follows: -

> **"193. In this instance, there might be a reduction in the period over which compensation was granted if the Tribunal had evidence before it suggesting that the Claimant's employment would in any event have come to an end at a particular point.**
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> **194. There was however no evidence to that effect. Whilst the Respondents appeared to be of the view that absence on the part of the Claimant was inevitable and would lead to her dismissal, there was in fact no guarantee of that occurring. The Claimant was pregnant and therefore any absences due to illness associated with her pregnancy would not found a fair dismissal. Further, the Claimant would on the anniversary of her employment in June of 2012 have obtained employment rights providing her with protection against unfair dismissal.**

> **195. This was not an area covered in submissions. The Tribunal however were of the view that there was no basis in evidence for it reasonably to conclude that the Claimant's employment would have ended at some point within the period in respect of which compensation was claimed."**

At no stage did the ET refer to the terms of the section 123 of the **Employment Rights Act 1996**, nor to the case of **Polkey v AE Dayton Services Ltd** [1988] 1 AC 344.

Submissions for the Respondent

18. Mr McGuire, counsel for the Respondent, lodged a skeleton argument which he supplemented orally. He argued that the ET had misdirected itself in law when it considered whether or not the compensatory award made to the Claimant should be reduced on the basis that the Claimant might have been dismissed fairly at some point in the future, that is after her unfair dismissal, and that the ET had made a perverse finding of fact of that "there was no basis in evidence for it reasonably to conclude that the Claimant's employment would have ended at some point within the period in respect of which compensation was claimed". He argued that the compensatory award is intended to reflect the actual losses suffered by a person who has been unfairly dismissed. He reminded us that section 123(1) of the **Employment Rights Act 1996** is in the following terms: –

> **"… Such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."**

He argued that the requirement that the sum be just and equitable meant that the ET could reduce the sum awarded. He made reference to the well-known case of **Polkey v AE Dayton Services Ltd** and in particular to the speech of Lord Bridge of Harwich as follows:-

> **"But if the likely effect of taking the appropriate procedural steps as they considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne -Wilkinson J put it in Sillifant's case at page 96:**
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> > **'There is no need for an "all or nothing" decision. If the industrial Tribunal thinks that is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a**

percentage representing the chance that the employee would still have lost his employment.' "

19. He argued that the correct approach by the ET was to consider whether or not an employee who had been unfairly dismissed might have been dismissed fairly in any event. He argued that it was not a question of probability of the person being dismissed but rather a question of whether or not there was a chance that they might be dismissed. He made reference to the case of **Wolesley Centres Ltd v Simmons** [1994] ICR 503 as authority for the proposition that Tribunal should adopt a two stage process and first consider if the employer had followed the proper procedure and acted fairly, the employee would not have been dismissed and secondly if there was an element of doubt, to make a percentage assessment of the likelihood of otherwise of the employee being retained. He referred to the case of **Software 2000 Ltd v Andrews** [2007] ICR 825 in which the rubric reads as follows: –

"Held, allowing the appeal, that in most cases the determination, under section 123 of the Employment Rights Act 1996, of the loss sustained in consequence of the dismissal, would involve the Tribunal predicting for how long the employee would have been employed but for the dismissal; that the evidence might be insufficient for the Tribunal to say that, on the balance of probabilities, the employee would have been fairly dismissed in any event, yet sufficient for it to conclude that there must have been some realistic chance that he would have been, in which case some assessment had to made of that risk when calculating the compensation;"

20. Counsel argued that the decision made clear that the ET should try to predict what might happen in future. He accepted, on the authority of **King v Eaton Ltd (No 2)** [1998] IRLR 686 that there may be occasions on which the evidence is such that it is too speculative for the ET to decide what would happen. He noted however that at paragraph 38 of the case of **Software 2000** it is stated that deciding that the exercise is too speculative means that the Tribunal must thereafter make the assessment on the same basis as if it had found that the employment would continue indefinitely. It is said that that may be unjust to the employer and that that fact alone suggests that the Tribunal should not be unduly reluctant to engage in the process. Counsel

referred to the case of **Ministry of Justice v Parry** [2013] ICR 311 in which it was held as follows: –

> **"In regard to the assessment of compensation, since the repeal of section 98 A (2) of the Employment Rights Act 1996, consideration of whether an employee would or would not have been dismissed in any event was to be based on a percentage representing the chance that the employee would still have lost his employment had a correct procedure been followed, and not on the balance of probabilities; and that, in adopting a 'yes/no' distinction, dismissal or not, the Tribunal had adopted the wrong test."**

21. Counsel argued that in the present case the ET had erred in law by adopting the wrong test. He drew our attention to paragraph 194 in which the Tribunal had said that whilst the Respondents appeared to be of the view that absence on the part of the Claimant was inevitable and would lead to her dismissal, "there was in fact no guarantee of that occurring." He argued that the ET was wrong to consider inevitability and guarantees. What they should have considered was, on the evidence, was there a chance that the Claimant would have been dismissed for reasons which were not unfair, and if there was, then what was the chance, expressed as a percentage. If they came to the view that there was a percentage chance then they should reduce the compensation accordingly. Counsel appreciated that the ET had not been addressed on this, no doubt because the Respondent represented himself and did not address the ET fully on the law. He argued that the ET had come to a perverse decision. They had said in paragraph 195 that they were of the view that there was no basis in evidence for them reasonably to conclude that the Claimant's employment would have ended at some point within the period in respect of which compensation was claimed. He argued that that was quite wrong, as the ET had found that the Claimant had a poor attendance record and that the Respondent had given her a final warning. She had given the Respondent an assurance that her attendance would improve but any improvement had been limited in time. The ET had found that while pregnancy was the effect of cause of dismissal, it was not the sole cause. The poor attendance record had been a matter of concern to the Respondent. Counsel argued that it was

therefore clear that there was evidence from which it could be inferred that there was a chance that she would have been dismissed in the period for which the ET gave compensation.

22. He argued that the part of the decision awarding compensation should be set aside and that the matter should be remitted either to a fresh Tribunal for a re hearing, or to the previous Tribunal who should be asked to consider the question of compensation afresh and to hear new evidence about that matter.

Submissions for the Claimant

23. Mr Honeyman, solicitor for the Claimant, also produced a skeleton argument. He argued that the ET had been aware that they should consider a possible reduction in the compensatory award, as they said so at paragraph 193. He accepted that they had not been addressed on this but he argued that it was plain at paragraphs 194 and 195 that they were aware of the law and that they considered it. He pointed out that the Claimant would have been working for the Respondents only between April and December 2012 prior to her maternity leave and he argued that the ET had found that it was not likely that she would be dismissed during that time. He argued that the ET had not been presented with evidence by the Respondents in connection with the likelihood of future absences. He argued that it was for the Respondent, whether self-represented or not, to lead evidence. He referred to the case of **Steel Stockholders (Birmingham) Ltd v Kirkwood** [1993] IRLR 515 as authority for the proposition that the person who sought a reduction required to bring evidence about it. He argued that the use of the word "guarantee" had been used by the ET because the Respondent had made a submission that the absence of the Claimant was "inevitable". Thus the ET had considered the argument put to it.

24. The ET had found that the Respondent was concerned that the pregnancy of the Claimant might be used by her to excuse further absences. Mr Honeyman pointed out, correctly, that any absence caused by the pregnancy itself would not give the Respondent cause to dismiss the Claimant fairly. He argued that any employer would be especially careful about dismissing a pregnant employee who claimed that she was suffering ill-health, as it would be difficult to be certain that any ill-health was not connected to pregnancy.

25. Mr Honeyman sought to argue that the case of **O' Donoghue v Redcar & Cleveland BC** [2001] IRLR 615 was authority for the proposition that it is not an error in law to decline to assess on a percentage basis. In that case the ET had decided that the Claimant who had been unfairly dismissed would have been fairly dismissed within 6 months of her actual dismissal and so reduced compensation to the period of 6 months. Mr Honeyman argued that the Court of Appeal had found in that case that there was no error in law in the Tribunal proceeding in that fashion.

26. With regard to the second ground of appeal, that the decision was perverse, Mr Honeyman argued that the ET decision, while not as clear and as full as it might have been, did show that the ET had considered all of the facts found by them and that those facts included facts which made it unlikely that there would be any dismissal. He referred to the finding at paragraph 174 in the following terms: –

> **"174. It was somewhat surprising, to put it mildly, that the Claimant was not then dismissed when she was next off. Equally there was no hint of any discussion with the Claimant regarding this absence. She was absent on 18 March. She retained her job. Nothing happened by way of disciplinary action. There was no question of her keeping her job due to mitigating circumstances in relation to this absence."**

Mr Honeyman argued that in so finding, the ET decided that the final warning had not been acted on. He argued that other findings, together with that finding, showed that the ET had

fully considered whether it could be said that there was a chance that the Claimant would have been fairly dismissed. He submitted that the ET had considered evidence from Mr MacInnes about his personal circumstances at the time. He explained that he had been busy, and upset, because his stepfather had been ill and he required to help his mother. The ET was not satisfied with the explanation as showing any reason why the Respondent did not dismiss the Claimant in March. The ET found in paragraph 177 that Mr MacInnes had made reference in evidence to there being a grant in respect of his employment of the Claimant. His evidence was that he was concerned that if he dismissed the Claimant he would have to pay back the grant and could not afford to do so. The ET was not impressed by that either, as a reason for his not dismissing her earlier. Firstly, the ET noted that no documents were produced to substantiate the position, and secondly it noted that if that was true it was difficult to know why the warning was given the terms which it was. Lastly there was evidence from the Respondents that they did not dismiss the Claimant in March because work was quiet at that time. The ET did not accept that as a good reason, as it found that it would be less inconvenient to dismiss a worker when things were quiet than when they were busy. As the Claimant would have sufficient service with the Respondent in June 2012 she would have protection from that date from unfair dismissal. The ET had, it was argued, considered all of these matters and was entitled to come to the view that there was no chance of the Claimant being dismissed fairly.

27. The ET had determined that the Claimant's pregnancy was the effective reason for her dismissal. It was argued before the ET on behalf of the Respondent that the Claimant was dismissed because of her absences but the ET did not accept that. In paragraphs 180 to 186 they explain why not. Mr Honeyman drew attention to the terms of paragraph 184, in the following terms:-

> **"On the evidence the Tribunal was therefore satisfied that the history of absence was an element in the decision to dismiss. It was however the existence of the Claimant's pregnancy**

which was the conclusive point in determining her fate. It seemed to the Tribunal on the evidence from Mr MacInnes that he was anticipating a further spate of absences, perhaps linked to pregnancy. There was then an absence on 20 April. His conclusion was that dismissal required to take place. Dismissal had not occurred in March after the final warning. That supported the Tribunal's conclusion that pregnancy was an effective cause of dismissal and that the dismissal was connected with the Claimant's pregnancy. There was no suggestion in evidence that the health of Mr MacInnes' step-father had improved significantly in April, making it possible or easier for him to tackle this matter. On the evidence the difference between the situation after the Claimant's absence on 18 March and that after her absence on 20 April was that the Claimant had intimated her pregnancy on 20 April. There was no evidence that the position with the grant and possible claw back had changed by the time April came around."

28. Mr Honeyman submitted that the appeal should be refused. He argued that the ET had not erred in law as it had made clear that it had considered whether there was any evidential basis for it to decide that the Claimant would have been dismissed in any event. He was constrained to admit that the ET did use the language of probability rather than the language of risk.

29. If we were not with him and were not prepared to dismiss the appeal then he argued that the case should be remitted to the same Tribunal in order that they might make a fresh decision on compensation, on the facts already found. He emphasised that the case had already taken 5 days and that a great deal of needless expense would be incurred if a new Tribunal had to make findings of fact. He argued that the Tribunal had made perfectly sound findings in fact which no one took issue with. The issue which was taken was that they had failed to explain fully their findings in law. Therefore if the case were remitted at all, it should be remitted to the same Tribunal.

Response by counsel for the Respondent

30. Mr McGuire replied on two points. He argued that the case of **O'Donoghue v Redcar & Cleveland Borough Council** was not a case which produced an approach to the calculation of compensation that the Tribunal was entitled to choose in preference to the approach set out in the case of **Polkey**. Rather, it was a case in which the court decided that while the assessment

of chance is the required calculation, it may in certain circumstances be permissible to take a view that employment will definitely come to an end in a particular period of time, and to reduce compensation accordingly. Thus it was not authority for the proposition which Mr Honeyman argued. It did not enable a Tribunal to decline to think about the percentage chance of a fair dismissal happening. In the present case the ET had appreciated that it required to consider whether or not compensation should be ordered for the whole period sought, but had applied the wrong test in making its decision as it had looked for certainty.

31. He argued that paragraph 174 illustrated that the ET were considering whether or not they could say with certainty that there would have been a dismissal in future. Their view that it was strange that the Respondent had not dismissed the Claimant in March was not decisive in the calculation they were required to carry out of whether there was a chance that she might have been dismissed fairly in future.

Discussion and decision

32. The argument before the ET focused on the effective cause of the Claimant's dismissal. The Respondent argued that he had not dismissed the Claimant because she was pregnant but because of her poor record of absence. The ET did not accept that argument from the Respondent. Having narrated the arguments put before it, the ET set out its reasons for finding that the effective cause of dismissal was pregnancy. It did so in paragraphs 170 to 186. It found, in those paragraphs, that the fact that the Respondent had not dismissed the Claimant when he had an opportunity to do so in March was of some weight in the decision that the ET required to make about the reason for dismissal in April. It also found, in the context of that decision, that the Respondent's arguments about not having time to consider matters, and the business being quiet were not arguments on which they could put much weight. These were all matters for the Tribunal. It does not seem to us however, that when considering the effective

cause of dismissal, the ET was also considering whether or not there was a chance of a fair dismissal had the Claimant not been dismissed due to her pregnancy.

33. The reasons as written by the ET make plain that they were not addressed on this question and it is perhaps therefore not surprising that they did not set it out very fully. They do however state under the heading of "Compensation" that they considered the matter and set out their decision particularly in paragraphs 192 to 195 referred to above. They do not at any time mention either the statutory provision, section 123 of the **Employment Rights Act 1996**, nor the cases on the subject. That may be because they were not addressed on them.

34. We have come to the view that the reasons stated by the ET show that they erred in law by applying too high a test. We accepted the submission from Mr Honeyman that in using the word "guarantee" the ET was in all probability dealing with the submission made by the Respondent that dismissal was "inevitable". Nevertheless, these words are not appropriate for the test which is one of chance. We accept the submission of Mr McGuire that the law is as set out in the cases to which he made reference. The matter is very clearly set out in the recent case of **Ministry of Justice v Parry**. The ET should have considered whether or not there was a chance, on the evidence, that the Claimant would have been dismissed, fairly, in any event. It cannot be said from the reasons that they did so. That is an error of law and therefore we allow the appeal on that basis. We remit the case to the same ET to decide afresh the compensation payable, taking into account the exercise they should have carried out of deciding if there is a percentage chance of a fair dismissal having happened in any event. If there is, then they have to decide what the percentage is, and make a deduction from compensation in line with that decision.

35. The ET should decide if there is evidence which enables them to make such a decision; if there is and, and they decide that there is a chance that the Claimant would have been fairly dismissed, then they should express that as a percentage chance. If having considered all of the evidence, the ET take the view that it would be too speculative for them to make any decision about the chance in the future then they should say so and explain why that is their view, bearing in mind the judgment in the case of **Software 2000**. If having considered all of the evidence, the ET take the view that they are able to say that the Claimant would definitely have been kept on by the Respondent, or putting that the other way around that there was no chance that the Respondent would have dismissed the Claimant fairly within the time for which compensation is sought, then they should say so and explain their reasoning.

36. We have considered the appropriate disposal and have decided that the case should be remitted to the Tribunal which has heard it already. We are conscious that that Tribunal has spent a considerable time listening to the evidence and making findings in fact. As was submitted before us, no issue is taken with those findings. The issue is taken with the legal test which has been applied to the findings. We therefore remit the case to the original Tribunal, with a direction that they should hear no more evidence, but should hear such submissions as parties wish to make on the findings in fact in the reasons, and on the law. The ET should then consider the question of compensation and give reasons for its decision.